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Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAMS NATURAL GAS COMPANY,
Cross-Petitioner,

v.

AMOCO PRODUCTION COMPANY, *et al.*,
Cross-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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II

QUESTION PRESENTED

Whether the court of appeals correctly refused, in accordance with the jurisdictional limitation imposed by Congress on reviewing courts in 15 U.S.C. § 3416(a)(4), to consider a refund claim that no party had presented in an application for rehearing before the Federal Energy Regulatory Commission.

STATEMENTS AS TO PARTIES TO THE PROCEEDING BELOW AND AS TO PARENT COMPANIES AND SUBSIDIARIES

These statements are contained in the principal petition for certiorari (No. 96-954) at pages ii-iv.

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BRIEF IN OPPOSITION

Amoco Production Company, Anadarko Petroleum Corporation, Mobil Oil Corporation, OXY USA Inc., and Union Pacific Resources Company (collectively, the "producers") oppose the cross-petition for a writ of certiorari.

STATUTE INVOLVED

The Natural Gas Policy Act of 1978 ("NGPA") provides in relevant part: "No objection to [an] order of the [Federal Energy Regulatory] Commission shall be considered by the court if such objection was not urged before the Commission in the application for rehearing unless there was reasonable ground for the failure to do so." 15 U.S.C. § 3416(a)(4).

STATEMENT

1. As we explained in the principal petition for certiorari, this case arose when the Federal Energy Regulatory Commission, having overruled a series of its own prior orders, crafted a remedial order designed to accommodate the equitable interests of all affected parties. From 1974 until 1993, both FERC and its predecessor (the Federal Power Commission) had consistently ruled —initially under the FPC's producer price regulations and later under the Natural Gas Policy Act of 1978 (which had codified the applicable FPC regulation)—that natural gas producers could properly recover, in the prices they charged to first purchasers, the cost of a production-related Kansas *ad valorem* tax. *See* Pet. 3-5 (detailing the consistent series of pre- and post-NGPA agency decisions authorizing recovery of such taxes). In 1993, on remand from a prior D.C. Circuit decision, FERC overturned its prior rulings and held for the first time that producers could *not* lawfully include in their prices the cost of the Kansas tax. *See* Pet. App. 43a-49a.

The Commission then confronted the task of devising an appropriate remedy to implement its new decision—a task complicated by the fact that the producers had acted pursuant to the agency's own express authorization. Rejecting the extremes of "a fully retroactive" or "a fully prospective" remedy (Pet. App. 53a), FERC settled on a partially retroactive refund remedy that, in its expert judgment, best balanced the parties' competing interests.

As the Commission explained, until June 1988—when the D.C. Circuit remanded an earlier FERC ruling on the Kansas tax—no official body had ever cast doubt on the agency's prior treatment of the Kansas tax. Pet. App. 52a (discussing *Colorado Interstate Gas Co. v. FERC*, 850 F.2d 769 (D.C. Cir. 1988)). Before that date, natural gas producers could "justifiably expect to recover Kansas *ad valorem* taxes . . . with no expectation of a later refund obligation." *Id.* "After that date," by contrast, "the

parties no longer would have been justified in relying on the Commission's earlier rulings with any assurance that they would not later be required to make refunds of *ad valorem* taxes and could have taken steps to protect themselves, such as establishing an escrow fund for such tax reimbursements." *Id.* *See also* Pet. App. 78a-79a ("until [the 1988 decision] there was justifiable reliance on the prior rule"; "[i]t is only when the court acted, and questioned the rationale of the Commission's prior ruling, that reliance on that ruling would no longer be justified"). FERC accordingly ordered producers to refund the Kansas tax costs that they had collected from their customers after (but not before) the June 1988 D.C. Circuit ruling. Pet. App. 51a-53a.

2. Under the NGPA, a party may seek judicial review of a FERC order only if it has first presented its objections directly to FERC in a timely application for rehearing. 15 U.S.C. § 3416(a)(4). In accordance with that requirement, several parties sought rehearing of FERC's remedial determination. Cross-petitioner Williams Natural Gas, however, was not among them. Nor did any of the parties who did seek rehearing raise the issue that Williams presents in its cross-petition. No party asserted that FERC was required to order refunds back to the date of the NGPA's enactment in 1978. On the contrary, the parties who objected to FERC's limitation of refunds—Public Service Company of Colorado and Cheyenne Light, Fuel & Power—*expressly disavowed* any request for refunds back to 1978, because, they explained, any such claim would violate principles of "fundamental fairness." C.A. App. 252. Those parties instead objected to FERC's initial ruling *only* insofar as it did not order refunds back to 1983, when Northern Natural Gas Company first asked FERC to "reconsider" and "rescind" the prior orders expressly authorizing recovery of the Kansas tax. C.A. App. 247, 250, 253.

FERC ultimately denied all petitions for rehearing and reaffirmed its equitable judgment that producers should be

required to refund only those Kansas tax costs that they had collected after the D.C. Circuit's 1988 decision. Pet. App. 78a-81a.

3. Several parties—but, again, not Williams Natural Gas—petitioned the D.C. Circuit to review and set aside FERC's order limiting refunds to the period after 1988.[1] The court of appeals, applying *de novo* review, reversed the Commission's remedial determination. Engaging in its own remedial analysis, and according no deference to the agency's contrary assessment, the court ruled that natural gas producers had neither "detrimentally" nor "reasonably" relied on the earlier Commission orders expressly authorizing recovery of the Kansas tax. Pet. App. 23a-24a. *See also* Pet. 7, 14 (discussing the court's unique understanding of "detrimental reliance").

On the strength of these *de novo* determinations, the court of appeals believed that it would have been appropriate to order refunds back to 1978. Pet. App. 24a. The court refused to enter such an order, however, because no petitioner had preserved, in an application for rehearing before FERC, an argument for refunds for any period prior to 1983. Pet. App. 20a n.*, 24a, 29a.

ARGUMENT

The D.C. Circuit's refusal to order refunds back to 1978 is a plainly correct application of an unambiguous and well-understood jurisdictional limitation on the power of a reviewing federal court to consider objections to a FERC order. This aspect of the court's decision accords fully with the decisions of this Court and of other circuits. The cross-petition accordingly should be denied.

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[1] As Williams acknowledges (Cross-Pet. 4), it participated in the court of appeals proceedings solely as an intervenor in *support* of FERC on an unrelated issue not before this Court—whether pipelines were required to act as guarantors to *their* customers of any refund obligations actually imposed on producers.

1. The NGPA expressly prohibits a federal court from considering any objection to a FERC order that was not presented in an application for rehearing before the Commission, unless there was "reasonable ground" for the failure to do so. 15 U.S.C. § 3416(a)(4). Neither Williams nor any other party argued on rehearing before FERC that refunds should be awarded back to 1978, and Williams does not even attempt to argue that there was any "reasonable ground" for that failure. As we have noted, the parties that did seek rehearing made a conscious strategic decision not to ask FERC for such relief —indeed, they expressly acknowledged that ordering refunds back to 1978 would violate norms of "fundamental fairness." C.A. App. 252.

The D.C. Circuit's decision on this point was thus a routine, case-specific application of the jurisdictional rule of section 3416(a)(4). Adhering to Congress's express directive, the court simply refused to award relief on a claim that had not been properly presented to the agency. *See* Pet. App. 20a n.*. That decision comports with decisions of this Court applying the nearly identical jurisdictional provision of the Natural Gas Act, *see FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 36 n.21 (1968); *Panhandle Eastern Pipe Line Co. v. FPC*, 324 U.S. 635, 645 (1945), as well as similar provisions of other statutes, *see EEOC v. FLRA*, 476 U.S. 19, 23 (1986); *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 311 n.10 (1979). It is also wholly consistent with the decisions of other courts of appeals under both the NGPA and the Natural Gas Act. *See, e.g., Ecee, Inc. v. FERC*, 611 F.2d 554, 559-66 (5th Cir. 1980) (NGPA); *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1422 n.10 (10th Cir. 1992) (NGA); *Independent Petroleum Ass'n v. Economic Regulatory Admin.*, 870 F.2d 168, 174 (5th Cir. 1989) (NGA); *ARCO v. FPC*, 585 F.2d 943, 946 (9th Cir. 1978) (NGA).

2. Williams errs in asserting that the D.C. Circuit "refused to apply clear Congressional intent." Cross-Pet.

6. On the contrary, the court adhered scrupulously to the statute's express limitation on the scope of its reviewing authority. *See generally Finley v. United States*, 490 U.S. 545, 547 (1989) (" 'courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction' ") (quoting *Ex Parte Bollman*, 4 Cranch 75, 93 (1807) (Marshall, C.J.)). Nor is there any basis for the suggestion that the court considered itself "controlled by an agreement of the parties on a question of law." Cross-Pet. 10. Rather, the court correctly understood that its jurisdiction was confined by the plain terms of section 3416(a)(4)—a provision that Congress enacted to ensure that the expert agency itself would be given an opportunity on rehearing to address an objection to its order before that objection could be presented to a reviewing court.

Williams's assertions, moreover, rest on a manifestly mistaken premise. The D.C. Circuit nowhere "acknowledged that the NGPA required a refund of all the Kansas taxes collected by the producers since the NGPA's enactment in 1978." Cross-Pet. 6. Indeed, if the court had believed that the NGPA itself automatically required refunds, the court's entire remedial analysis would have been pointless. The court would have had no reason to consider whether the producers had "detrimentally relied" on the agency's prior rulings if it thought the statute itself required refunds.

In any case, it is wholly untenable to suppose that the NGPA necessarily requires fully retroactive refunds in a case like this and that Congress thereby deprived FERC of the remedial discretion traditionally accorded to expert regulatory agencies. On the contrary, as we explained in our petition for certiorari (at 11-12), FERC derives both its remedial *authority* and its remedial *discretion* from a single provision of the NGPA—which merely empowers the agency, in general terms, to "perform any and all acts . . . as it may find necessary or appropriate to carry out its functions." 15 U.S.C. § 3411(a).

Williams points to 15 U.S.C. § 3413(e)(2)(B)[2] as the supposed source of the NGPA's mandatory refund rule. Cross-Pet. 3. But that section has no application to this case. Section 3413(e) applies, by its plain terms, only to "interim collection[s]" for certain kinds of natural gas pending initial agency determination of whether the rates charged for the gas comport with certain specified statutory requirements. Section 3413(e)(2)(B) simply provides that, where producers make such interim collections "pending a determination under this section," those collections are subject to refund if the rate charged is later found to be too high. This case, however, involves no such interim rate, nor does it implicate any of the specific statutory requirements with which section 3413 is concerned. *See* 15 U.S.C. § 3413(a)(1) (listing specific kinds of determinations to which section 3413's provisions, including its rules on interim collections, apply). There is no basis, therefore, for Williams's suggestion that the NGPA "gave customers the unqualified right to obtain refunds for any price charged in excess of the maximum lawful price" (Cross-Pet. 3), much less for its suggestion that the D.C. Circuit accepted such a contention in this case.

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[2] This provision is reproduced at Pet. App. 107a.

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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